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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 297

HYMAN-MICHAELS COMPANY, *Petitioner*

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (Pet. App. "B") is reported at 140 F. Supp. 784.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956.[1] The petition for a writ of certiorari

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[1] A timely motion by petitioner to set aside the judgment was denied on July 12, 1956.

was filed on August 1, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims properly concluded that a guarantee provision in a contract of sale between the United States and petitioner should be interpreted in accordance with its terms and that there was no satisfactory showing that the parties' mutual intention differed from the plain meaning of the language which they adopted.

STATEMENT

Petitioner brought suit against the United States in the Court of Claims for breach of contract to recover the difference between the sum for which it sold certain surplus barbed wire situated in Iraq and purchased from the United States, and the price which it had paid therefor. The pertinent findings of the court below may be summarized as follows:

On September 15, 1947, petitioner contracted to purchase an estimated 2,100 long tons of barbed wire from respondent at a price of $120 per ton. Three months prior to this sale, the United States had concluded an agreement with the Government of Iraq regarding the disposition of surplus property located in that country. The agreement provided that surplus items would be offered initially to the Government of Iraq. Finding 3.[2] If Iraq declined to buy and the United States sold to another purchaser, Iraq agreed

[2] The findings of the Court of Claims appear immediately following the court's opinion. Pet. App. "B", pp. 5-15.

that it would honor the bill of sale as an export permit (*ibid.*).

During the sale negotiations, petitioner's vice president was informed of Iraq's export controls. He was advised that the Government of Iraq had refused purchase of the wire and that accordingly, under the agreement reached between the two Governments, respondent could obtain issuance of an export permit. Findings 7(a), (b). Since petitioner intended to resell the wire to a foreign purchaser, exportability was of primary importance in the negotiations. Finding 7(a). In this connection, it appears that both parties were aware of tension and unrest in the Middle East and of the possibility that armed conflict might result from implementation of the recently promulgated United Nations' report containing recommendations for the partition of Palestine. Finding No. 4.

The contract contained the following provision (Article 11):

> The Seller guarantees that permission to export the property * * * has been granted by the Iraqi Government.

Upon ratification of the contract, petitioner promptly initiated negotiations for resale of the surplus wire to a South American purchaser. Finding 12. The negotiations broke down, however, when petitioner became dissatisfied with the prospective buyer's credit arrangements and refused to complete the transaction (*ibid.*). On May 14, 1948, eight months after the original sale, the Government of Iraq declared martial law and, on May 25, 1948, Iraq authorities prohibited

the export of a variety of military items, including barbed wire, except with the authorization of the Ministry of Defense. Findings 14, 16. On September 12, 1948, petitioner's request for permission to export the wire was denied. Finding 20. Thereafter, at petitioner's request, respondent agreed to approach the Iraqi Government, upon being advised of the name of the new prospective purchaser and of the country to which the wire would be exported. Finding 23. Respondent's representative further suggested that the prospects of success would be increased if the prospective purchaser would have his government assure the Iraqi Government that the wire would not be reexported to Israel (*ibid.*). On October 21, 1948, petitioner replied that negotiations to obtain such a guarantee from the government of the purchaser would involve protracted proceedings, and that it felt that the contract had been breached. Finding 24(a).

The Court of Claims concluded that the United States had not undertaken a warranty against changes in international conditions which might induce Iraq to forbid exportation. It therefore denied recovery.

ARGUMENT

This case involves a narrow issue of contract interpretation. The unambiguous language of the provision involved (Article 11) not only supports, but patently requires, the Court of Claims' construction. The court below nonetheless permitted a full hearing on the question whether the parties' mutual intention was different from that expressed in the contract. It concluded that it was not. See Finding 30(b); opin-

ion, Pet. App. "B", pp. 3-4. There is no occasion for review of this factual determination.

Petitioner's case necessarily rests on the proposition, without support in the contract, that the language of the guarantee ("the Seller guarantees that permission to export the property * * * has been granted by the Iraqi Government") went beyond a representation as to an existing fact. Petitioner asks, in substance, that the courts treat the words, "has been granted," as if the parties had written, "has been granted and will not be withdrawn or rescinded."

It is unlikely, on the face of it, that a representative of the United States would agree to an arrangement whereby a purchaser of surplus property would be entitled to hold it indefinitely (perhaps speculating on a rising market) and rescind his agreement to purchase if it developed at any future time that the acts of a foreign government created an obstacle to resale. To hold a contractor to so burdensome an agreement one would expect, at the least, words which unequivocally import such an undertaking. Here the words negate it.

The Court of Claims' interpretation does not deprive Article 11 of meaning. The United States, by that provision, represented that Iraq had, in fact, declined to exercise its prior right of purchase, and that the way was accordingly clear, under the terms of the inter-governmental agreement, for petitioner to make the purchase and to dispose of the property. There is no reason whatever to suppose that petitioner's vice-president, an experienced negotiator (Finding 7(a)), believed that there had been any broader commitment.

More than eight months passed between the sale by the United States to petitioner and Iraq's declaration of martial law. Almost a year passed before petitioner actually requested an export permit. Petitioner took the risk that Iraq, as a sovereign nation, might, one day, decide to prevent exportation of war materiel, such as barbed wire. The United States never undertook to insure against such a contingency—a matter over which it had no control.

Petitioner argues that there is no specific finding to support the statement in the court's opinion that there was no satisfactory evidence "that the language [of the contract] meant anything substantially different from what it said" (Pet. App. "B", pp. 3-4). This contention is frivolous. The court specifically found (Finding 30(b)):

> When the guarantee clause was inserted in Article 11 (that permission to export had been granted by Iraq), both parties expected that the Government of Iraq would abide by the commitment it had made with the United States. Neither of the parties intended or understood the defendant was undertaking a warranty against changes in conditions by reason of which Iraq might forbid export based on a change in national policy unrelated to the *bona fides* of its commitment to the United States.

CONCLUSION

The decision below is clearly correct and the case presents no issue warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

PAUL A. SWEENEY,
ROBERT PITOFSKY,
Attorneys.

AUGUST, 1956

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